

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO
APPELLATE DIVISION

THE PEOPLE,
Plaintiff and Respondent,
v.

DONOVAN JAMES WINTERS,
Defendant and Appellant.

Case No: ACRAS 1100151
(Trial Court: V053926ADW)

P E R C U R I A M
O P I N I O N

Appeal from judgment of conviction after court trial, San Bernardino County Superior Court, Victorville District, Patrick L. Singer, Commissioner. Reversed.

Donovan James Winters, defendant and appellant in propria persona.

No appearance for plaintiff and respondent.

THE COURT:*

FACTS¹

Appellant Donovan James Winters received a Notice to Appear issued by the Victorville Police Department, charging him with failing to stop at a red signal (Veh. Code, § 21453, subd. (a).) The violation had been recorded by an automated traffic enforcement system camera

* Brisco, P. J., Ochoa, J., and Pacheco, J.

¹ The facts are taken from the clerk's transcript and the settled statement on appeal, as corrected and certified by the trial court on December 8, 2011. (Cal. Rules of Court, rule 8.836.)

(commonly known as a “red light camera”). (Veh. Code, § 21455.5.) The red light camera system in question was provided and operated by a company known as Redflex Traffic Systems of Phoenix, Arizona.

Appellant entered a plea of not guilty and requested a trial by written declaration. (Veh. Code, § 40902.) The trial by declaration resulted in a finding of guilty by the trial court. Appellant then timely requested a trial de novo (Veh. Code, § 40902, subd. (d)), which was granted by the trial court.

The court trial was held on October 4, 2011. At trial, appellant brought a motion to dismiss the charges, which was denied. The court then heard testimony from prosecution witness Barbara Hill, a Sheriff’s Services Specialist from the Victorville Police.² Ms. Hill offered testimony designed to lay a foundation for the admissibility of the citation, the photographs and the videotape that purportedly depicted appellant’s offense. That testimony consisted of reading a prepared three-page “Foundational Statement,” which the trial court attached to the settled

² While the minute order from the trial refers to the witness as “Officer Hill,” the settled statement certified by the trial court consistently refers to her as “Sheriff’s Service Specialist” or “SSS.” There is no explanation in the record as to whether or not SSS Hill is in fact a police officer or an unsworn employee of the police department, but the San Bernardino County Sheriff’s website lists “Sheriff’s Services Specialist” as a “non-sworn” position. The witness is referred to in this opinion as “Ms. Hill.”

There is also some discrepancy in the record on appeal as to whether an Officer Felix also testified at trial. The minute order from the trial states: “People’s Witness OFFICER FELIX/OFFICER HILL sworn and testifies.” (CT 31.) However, the certified settled statement on appeal is devoid of any mention of any testimony by an Officer Felix, and the record on appeal contains no reference to any Officer Felix or what that person’s involvement in this matter may have been. We accept the settled statement as correct, because the trial judge is the final arbiter of that issue. (*People v. Beltran* (1981) 124 Cal.App.3d 335, 340; *In re Apperson* (1961) 188 Cal.App.2d 830, 832; *Burns v. Brown* (1946) 27 Cal.2d 631, 636.) Even if Officer Felix *did* testify, the record on appeal does not include any record of that testimony. Accordingly, the only testimony considered on appeal is that of Ms. Hill, and only to the extent it is documented in the settled statement.

statement. That statement includes a recitation of facts relating to the public hearings and other steps taken by the city of Victorville in implementing the red light camera system, as well as a recitation of the manner in which the system records traffic violations. It also contains an explanation of how the photographic images of traffic violations are captured, stored, downloaded and transmitted to Redflex for review by Redflex employees. The statement also addresses the procedures for synchronizing, inspecting and maintaining the camera system equipment. The concluding language of the statement indicates that the statement was read by Ms. Hill as a preliminary to all of the Redflex red light camera cases tried before the court that day.³

Ms. Hill also introduced what is referred to in the settled statement as the “City of Victorville Court Evidence Package,” which included the photographs and videotape taken from the red light camera system. Ms. Hill testified as to the contents of the photographs and the video, and the bench officer then viewed the photos and video. The court found that the photos and video were “authentic depictions” of the intersection in

³ “The citations being presented today were issued as a result of photo and video data collected by the Redflex automated traffic enforcement system. Each citation packet that will be presented today to the court includes the following: citation; Declaration of Custodian of Records; Photo 1, showing the defendants [sic] vehicle behind the limit line with the traffic signal in the red; Photo 2, showing the defendant’s vehicle through the intersection and the traffic signal still in the red; Photo 3, showing a face image of the driver in the vehicle; Photo 4, showing the license plate number of the vehicle; a copy of the Nomination forms if applicable; a printout of the vehicle registration obtained from the California Law Enforcement Telecommunications system known as (CLETS); a printout of the driver’s driving record from CLETS; a printout of the driver’s face photo from Photo 3 of the citation; a printout of the driver’s photo from the California Department of Justice Cal-Photo Image Network; a CD with a 12 second video showing the vehicle committing the violation.”

question, based on the court's own personal familiarity with the intersection. The court further found that the photos and video depicted appellant committing the infraction with which he was charged.

Appellant cross-examined Ms. Hill, and asked if she was present at the time of the offense. She responded that she was not. He also asked her several questions about whether she was a Redflex employee, whether she knew the manufacturer or model of the photographic equipment or computers involved, the encryption procedure, or the operating system.

Appellant objected to Ms. Hill's testimony on grounds of hearsay and on Sixth Amendment confrontation grounds. The court overruled the hearsay objection "since none of SSS Hill's testimony included declarations by and out of court declarant and the photographs and video constituted demonstrative evidence and did not meet any definition of hearsay in the Evidence Code." The court overruled the confrontation objection "since Defendant Winters had not subpoenaed any Reflex [sic] employees and the court found SSS Hill's testimony concerning the operation of the automated system sufficient to authenticate the photographs." The court noted in the settled statement that appellant did not request a continuance to subpoena Redflex employees or to gather additional evidence.

On appeal, appellant contends the trial court erred in admitting the testimony of Ms. Hill and the photographic evidence. He also contends the trial court erred in ruling that it was appellant's obligation to subpoena witnesses from Redflex to appear at trial. We agree with both contentions, and we therefore reverse the judgment.

Discussion

Standard of Review

A trial court's decision regarding the admission of evidence is reviewed for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.) The trial court's exercise of discretion will be disturbed on appeal only if the court's decision exceeded the bounds of reason. (*People v. Osband* (1996) 13 Cal.4th 622, 666; *People v. Mobley* (1999) 72 Cal.App.4th 761, 792-793.)

No judgment will be reversed because of erroneous admission of evidence unless the appellant can show the error resulted in a miscarriage of justice. (Evid. Code, § 353, subd. (b); see *In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1385.) That is, the appellant must show that, absent the error, it is reasonably probable a more favorable result would have been reached at trial. (*People v. Page* (2008) 44 Cal.4th 1, 42; *People v. Jordan* (2003) 108 Cal.App.4th 349, 366; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 843.)

1. The Court Erroneously Overruled the Hearsay Objection

A. The Photographs and Videotape are Writings

The stated basis for the court's overruling of appellant's hearsay objection was that the photographs and videotape were "demonstrative" evidence that did not fit the definition of hearsay under the Evidence Code. The trial court was mistaken. Under the Evidence Code, photographs and videotapes are considered "writings." (Evid. Code, § 250; see *Rojas v. Superior Court* (2004) 33 Cal.4th 407, 416 [photographs]; *Jones v. City of Los Angeles* (1993) 20 Cal.App.4th 436, 440 [videotapes].) Accordingly, they are subject to the same foundational and hearsay rules as all writings.

The settled statement makes it clear that Ms. Hill testified as to the contents of the photographs and the videotape obtained by the Redflex camera system. The contents of the photographs were offered for their truth—that appellant did in fact commit the alleged traffic violation. The same is true of the majority of the "Foundational Statement" read into the record by Ms. Hill. That statement was replete with factual assertions that were offered for their truth, regarding the manner in which the red light system was implemented, how it works, and how it is maintained. The photographs, video and "Foundational Statement" were hearsay, and were inadmissible upon appellant's objection, unless they satisfied a recognized exception to the hearsay rule. The record on appeal does not establish the existence of any such exception.

B. The Photographs and Videotape Required Authentication

A writing, including a photograph or videotape, must be authenticated before it can be received in evidence. (Evid. Code, § 1401, subd. (a).) Further, the writing must be authenticated before secondary evidence of its content can be received in evidence. (Evid. Code, §1401, subd. (b).)

“Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.” (Evid. Code, § 1400.) It is not necessary to present testimony of the individual who made the videotape or photograph in order to authenticate it. “[T]he testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is legally sufficient foundation for its admission into evidence.” (Evid. Code, § 1413; *Jones v. City of Los Angeles*, *supra*, 20 Cal.App.4th at p. 440, quoting *People v. Bowley* (1963) 59 Cal.2d 855, 859; see also *People v. Doggett* (1948) 83 Cal.App.2d 405, 409-410.)

C. Respondent Failed to Authenticate the Evidence

Here, no employees of Redflex testified at trial. Instead, the prosecution relied exclusively on the testimony of Ms. Hill to lay the foundation for the photographs and videotape. Ms. Hill did not testify she made the photographs or videotape herself. She did not testify she was

present at the time of appellant's alleged vehicle code violation, and witnessed the events depicted in the photographs—in fact, she testified that she was *not* present. She did not testify to any personal knowledge of the contents of the photographic images or the method of their creation, storage or transmission—instead, she recited a prepared statement that contained no evidence that she was testifying to facts within her own knowledge, or even that she had prepared the statement herself.

At most, Ms. Hill testified she had attended training sessions on the red light camera system three times since January 2011, and displayed a general familiarity with the system. She did not, and logically could not, attest that the photos or videos were true representations of what they purported to depict because she had no such personal knowledge. In short, Ms. Hill failed to provide any of the evidence necessary to lay a foundation for the admission of the statement, the photographs or the videotape into evidence.

2. The Court Erroneously Overruled the Sixth Amendment Objection

Appellant also objected to the testimony of Ms. Hill on the grounds it violated his Sixth Amendment rights to confront and cross-examine adverse witnesses. The trial court overruled that objection because it found “the legislature has authorized this type of evidence” and because

appellant had not subpoenaed any employees of Redflex to appear at trial. In so ruling, the court abused its discretion.

The law places no burden on the defendant to subpoena adverse witnesses so they can be available for cross-examination. Instead, that burden is placed on the prosecution. The Confrontation Clause of the Sixth Amendment of the United States Constitution requires the prosecution to present its witnesses and make them available for cross-examination by the defendant. (*Crawford v. Washington* (2004) 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305.)

The power of a defendant to subpoena adverse witnesses is not a substitute for the constitutional right of confrontation. (*Melendez-Diaz* at p. 330.) “While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses ‘against him,’ the Compulsory Process Clause guarantees a defendant the right to call witnesses ‘in his favor.’ [Citation.] The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter.” (*Id.* at p. 323.)

“Converting the prosecution’s duty under the Confrontation Clause into the defendant’s privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause

imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.” (*Id.* at p. 330.)

The trial court erred by ruling that it was appellant’s obligation to subpoena Redflex employees to appear at trial if he wished to confront them and cross-examine them regarding the photographic evidence. That burden was the prosecution’s alone, and could not be shifted to appellant.

3. The Errors Were Prejudicial and Mandate Reversal

The trial court’s rulings resulted in the admission into evidence of the photographs and videotape obtained by use of the Redflex camera system. Because the prosecution’s sole witness, Ms. Hill, did not witness the traffic violation, the photographs and video constituted the entirety of the evidence against appellant. In the absence of that evidence, there was no evidence to support the verdict and the judgment. Accordingly, the erroneous admission of the evidence resulted in a miscarriage of justice, and the judgment must be reversed. (*People v. Page, supra*, 44 Cal.4th at p. 42.)

Disposition

The judgment is reversed and the matter is remanded to the trial court with directions to dismiss the charges. (*People v. Bighinatti* (1975) 55 Cal.App.3d Supp. 5, 7.)

JOSEPH R. BRISCO
Presiding Judge of the Appellate Division

GILBERT G. OCHOA
Judge of the Appellate Division

JOHN M. PACHECO
Judge of the Appellate Division